IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 2725 OF 2004

Bharat Petroleum Corporation Ltd.
A Government Company incorporated
under the provisions of the
Companies Act, 1956 and having its
registered office at Bharat Bhavan,
Ballard Estate, Mumbai 400 038. ... Petitioner

Vs.

1. Petroleum Employees' Union,
a trade union registered under the
Trade Union's Act, 1926 and having
its registered office at Tel
Rasayan Bhavan, Tilak Road,
Dadar (East), Mumbai 400 014.

2. Justice S.P. Pandey,
Presiding Officer, Central
Government Industrial Tribunal
No. 1, having its Court situated
at Shramraksh Bhavan, Shivshrusti
Road, Opp. A.P.I. Eastern Express
Highway, Sion, Mumbai 400 022. ... Respondents

Mr. R.S. Pai i/by Sanjay Udeshi & Co. for Petitioner.

Ms. Gayatri Singh for Respondent.

CORAM : F.I. REBELLO,J.
DATED : OCTOBER 27, 2004

ORAL JUDGMENT

1. Rule. By consent heard forthwith.

2. The workman represented by Respondent No. 1 is employed with the Petitioners. He applied to the Petitioner for a loan for purchase of motor cycle in terms of the existing rules. In furtherance of this application dated 1.3.1994, company addressed a letter to him dated 22.3.1994. The workman was informed that in the event he did not purchase the

vehicle within the period of one month from the date of disposal of the loan, he ought to make arrangements to refund the loan to the Corporation in one lumpsum within the period of one month failing which penal interest at an additional rate of 5% above the bank rate would be charged on the loan taken for the period in excess of one month untill the amount is refunded and further no further loan for purchase of vehicle will be sanctioned to him for five years from the date of default. The interest on the loan advanced was 2.5% p.a. By letter of 29.6.1994, the petitioners informed the workman that he had been paid an amount of Rs.30,000/- on 25.4.1994 towards the purchase of vehicle. As the workman failed to purchase the vehicle in terms of Clause 19(a) of the sanction letter, the Petitioner was called upon to refund the amount along with penal interest at the rate of additional 5% above bank rate. The prevailing bank rate with penal interest worked out to about 20.75% for the period in excess of one month. It will be clear therefore, that the rate of interest on the loan at the time it was advanced was 2.5% and after default the rate of interest as worked out by the company on 25.6.1994 was 20.75 %. A subsequent letter was addressed on 25.10.1994 once again intimating to the workman that he had not purchased the vehicle and that act amounted to misappropriation of companies funds amounting to

Rs.35,000/-. By his letter of 16.11.1994 the workman admitted that he had been advanced loan of Rs.30,000/- but on account of family problems and family restrictions, he could not buy the vehicle till that date. He had overcome the family problems and that delivery of the vehicle would be taken within a weeks time. He denied that he had misappropriated the amount taken from the company.

3. By the subsequent letter of 16.12.1994 the workman was served with chargesheet in which he was charged as under :

> "Attempting to secure in a fraudulent manner pecuniary advantages from the Corporation's fund."

. By letter of 4.2.1995 the workman informed the company, that he had already received the vehicle which he had booked on 15.11.1994 and was in a position to produce or submit the required documents and as he had already given reasons for the delay his explanation may be sympathetically considered and the domestic enquiry be not proceeded with. The bill produced shows that the cost of the vehicle was Rs.33,770/- and along with other charges, the cost of the vehicle amounted to Rs.41,190/-. This is in terms of the bill No. 425 dated 4.2.1995 issued by NS Sales Services in terms

of the order placed by the Petitioner dated 15.11.1994.

4. An enquiry came to be conducted. The enquiry Officer on the material and the evidence placed before him by his report dated 3.10.1995 came to the conclusion that the charge as levied against the workman had not been proved and consequently absolved the workman of the charge framed by the company. By letter of 26.8.1996 the Disciplinary authority informed the workman that in his opinion the findings of the Enquiry Officer were perverse and not in consonance with the evidence led in the enquiry and the documents placed on record during the enquiry and as such did not concur with Enquiry Officer's report and findings thereof. The reasons as to why the disciplinary authority did not concur with the report of the Enquiry Officer was enclosed with the said letter. Workman was called upon to give his representation to the findings as communicated. The workman showed cause by letter of 30.9.1996. By letter of 2.12.1996, workman was informed that as the workman has raised objections to the authority of Disciplinary authority in reviewing the enquiry Officer's report and though the Disciplinary Authority was within his right to review the findings of the Enquiry Officer, he was of the opinion in order to maintain fair play that the workman be given one more opportunity to

explain his position. The General Manager therefore, directed that enquiry be conducted afresh by another Enquiry Officer. On receipt of that communication, the workman by his letter of 11.12.1996 informed that the fresh enquiry should not be held and the findings of the Enquiry Officer should be implemented. Fresh enquiry was initiated. In the meantime, matter was taken in conciliation and by order dated 9.11.1998, the Appropriate Government referred the dispute as raised for adjudication to the Tribunal. The English translation of the Reference reads as under :

> "Whether, the order of second inquiry, for the same charges leveled against Mr. Ajit Kambli by refusing the recommendations made in the inquiry report by inquiry officer of B.P.C.L. is violating the provisions of Standing Orders?
>
> If Yes,
>
> What directions are required?"

. Before the reference was made, the Enquiry which was initiated at the instance of the General

Manager stood concluded. The stand of the workman before the Enquiry Officer was that the second enquiry could not be proceeded with. As the workman did not participate in the enquiry an order was passed to proceed exparte. The enquiry Officer based on the material before him held the workman guilty of the charge. An opportunity was given to the workman to which he replied and thereafter by order dated 9.9.1997, the General Manager ordered that the workman be punished with demotion to a lower grade. Consequently Respondent was demoted from Operator (Field) IV, Grade 2 to Operator (Field) V Grade 2 and his basic salary stood revised from 2997/- to Rs.2961/-.

5. On the reference being made, parties filed claim statement and written statement respectively. On behalf of the Respondents, evidence was led of one Shri. Satish Kumar Nair who was at the relevant time the General Secretary of the Union.

On behalf of the Petitioner no evidence was led.

. The Tribunal by its award of 31.5.2004, after quoting from the correspondence and the standing orders as also letter sanctioning the loan came to hold that the question of obtaining pecuniary advantage did not arise because the terms and agreement permitted the workman to retain Rs.30,000/- and pay penal interest of 5% above the

Bank rate for the period in excess of five months and forgo a loan on vehicle for a period of five years and that there was no attempt to defraud the Corporation and as such no pecuniary advantage could be received by the workman. The Loan was refundable even if the vehicle was not purchased and it could be recovered from the workman as per agreement along with penal interest. Thus no charge could be framed for taking any pecuniary advantage. The workman it was held could not be saddled with responsibility of causing wrongful loss to the Corporation as the loan was liable to be refunded at higher rate of interest. It is this award which is the subject matter of the present challenge.

6. At the hearing of this petition, on behalf of the petitioner, it is firstly contended that the Tribunal exceeded its jurisdiction in holding that what the workman was charged with was not misconduct considering the terms of Reference was whether the second enquiry was in violation of the provisions of the Standing Orders. It is submitted that the tribunal was bound by the terms of Reference and could not have gone beyond the said terms. Having done so, the award is without jurisdiction. It is then submitted that even if the learned Tribunal had come to the conclusion that second enquiry ought not to have been

initiated, then the employer management could not have been precluded from proceeding to take action based on the findings of the first enquiry report. The award in as much as it precludes the Petitioner from so proceeding is without jurisdiction. Lastly it is submitted that the tribunal acted without jurisdiction in denying an opportunity to the company to justify the punishment imposed on the workman. That opportunity having not been given consequently also the award is liable to be set aside.

. In answer, on behalf of Respondent No. 1, learned counsel submits that the award should be read in its totality. It would be within the jurisdiction of the Tribunal based on the terms of the Reference to arrive at a conclusion that the charges as levelled against the workman in fact would not amount to misconduct. It is submitted that this would be incidental to the Reference itself and therefore, it cannot be said that the Tribunal acted without jurisdiction. It is next submitted that considering the charge itself, it would be clear that merely because workman had availed of the loan and had not purchased the vehicle within the time as stipulated by the Corporation, it cannot be said that that it amounted to securing or attempting to secure in a fraudulent manner pecuniary advantages from the

Corporation's fund. Apart from that it is pointed out that the company had by charging interest at the higher penal rate not only recovered interest but also penal interest. The claim of the Petitioner company would therefore, not fall within the definition of misconduct within the meaning of Standing order 28.22. Once the Tribunal holds that there was no misconduct there was no question of granting opportunity to the employee to justify its action in punishing the workman.

. Both the parties have relied on judgement which will be adverted to, to the extent necessary.

7. We may firstly consider the law on the subject as to what would constitute a misconduct. On behalf of the respondent their learned counsel relies on the judgment in the case of A.L. Kalra Vs. Project and Equipment Corporation of India Ltd. (1984) 3 S.C.C. 316. In that case as in the present case, the delinquent employee had taken advance for purchase of a plot. He did not purchase the plot for some time but did purchase it subsequently. The service rules provided that if the loan advanced was not used for the purpose of which the amount has been advanced, within the specified period, the same would be recoverable in terms of the rules. A charge was framed against the delinquent employee, that within the time

granted, he had not purchased the property. The misconduct which the workman delinquent was charged was under Rule 4 of the rules and the charge against workman was that the employee had failed to maintain absolute integrity. Rule 5 of those rules prescribed various misconducts. Considering the language of Rule 4, the Apex Court noted that Rule 4 was vague and was of general nature and what is unbecoming of a public servant may vary with individuals and unless expressly defined would expose employees to vagaries of subjective evaluation. The Apex Court then observed as under :

> "What in a given context would constitute conduct unbecoming of a public servant to be treated as misconduct would expose a grey area not amenable to objective evaluation. Where misconduct when proved entails penal consequences, it is obligatory on the employer to specify and if necessary define it with precision and accuracy so that any ex post facto interpretation of some incident may not be camouflaged as misconduct. It is not necessary to dilate on this point in view of a recent decision of this Court in Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut

> where this Court held that " everything which is required to be prescribed has to be prescribed with precision and no argument can be entertained that something not prescribed can yet be taken into account as varying what is prescribed. In short it cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty."

. Considering that, the Apex Court found that even in case of breach of the rules only if the misconduct was specifically defined, could the workman be held guilty. The alleged misconduct therein did not amount to misconduct under the rules. It may be pointed out that Kalra's Judgement came up for consideration before the Apex Court in B.C. Chaturvedi Vs. Union of India, 1995 (6) S.C.C. 749. The basic proposition as laid down in Kalra's case has not been departed from.

. On behalf of the employer petitioner, the

learned counsel has drawn my attention to the judgement of the Apex Court in the case of Secretary to Government and Others Vs. A.C.J. Brito 1997 II LLJ 388. The case of Kalra again came up for consideration and was distinguished. A.C.J. Brito, was a Sub Inspector of Police. The Apex Court noted that the applicable rules did not specify the acts of misconduct. Rule 2 however, empowered the competent authority to impose upon the Member of the service certain penalties specified therein for good and sufficient reasons. It is on these facts that the Apex Court observed that not obeying the orders of the Superior by Member of the Police force has to be regarded as an act of indiscipline and would certainly provide good and sufficient reason for initiating disciplinary proceedings. The court relied on the judgement in the case of Ranjit Thakkar Vs. Union of India and Ors. 1988 I LLj 256 which has taken a view that disregard of an order to eat food by itself amounted to disobedience to a lawful command for purposes of section 4 of the Army Act, 1950. It is in this context that the Apex Court distinguished the view taken in Kalra (supra). In B.C. Chaturvedi Vs. Union of India (1995) 6 S.C.C. 749 the issue was in respect of an act which was not set out as a misconduct. The Apex Court therein noted that even if the misconduct alleged does not fall within misconduct under the

rules, yet as the act amounted to misconduct within the meaning of Prevention of Corruption Act, that by itself would be misconduct and there was no need to specifically include the same.

. From the ratio of these judgments of the Apex Court what would become clear is that there is no departure from the view taken in A.L. Kalra (supra). The Judgement in B.C. Chaturvedi or for that matter A.C.G. Brito are in the context where otherwise misconduct could be spelt from other rules even though the misconduct was not specifically set out as a misconduct. The delinquent employee could still be charged for an act of misconduct. Having said so, in our case we are really not concerned with the general proposition as the Management in fact has chargesheeted the employee under Standing Order 28.23 which reads as under :

> "Securing or attempting to secure in a fraudulent manner pecuniary advantages from the Corporation or from the Funds created by the Corporation."

8. We may now deal with the objection raised on behalf of the Petitioners herein that the Tribunal in answering the Reference could not have proceeded to answer the question which was not the subject

matter of the Reference. Learned Counsel has placed reliance on the judgment of the Apex Court in Pottery Mazdoor Panchayat Vs. The Perfect Pottery Co. Ltd. and others, 1979 (38) FLR 38. In the instant case as noted earlier, the specific question referred to was whether the order of second enquiry for the same charges against the workman by refusing recommendations made in the enquiry report by the Enquiry Officer of B.P.C.L. is violative of the Standing Orders. From the Award of the Tribunal nothing is discernible to find out as to whether under what provisions of the Standing Orders and or for that matter the other provisions of the Law a second enquiry initiated stood vitiated. Discussion which is found is only to the extent that the misconduct in respect of which the workman was charged was not misconduct within the standing order No. 28.23. In other words, the learned Tribunal did not answer the Reference as specifically made to it. In these circumstances, ordinarily the matter ought to have been remanded back to the Tribunal for reconsideration and answer thereto. It may however, be pointed out that while answering the reference, it is open to a Tribunal to decide incidental questions corelated to the Reference. It was therefore, open to the Tribunal, if it came to the conclusion that if the charge framed was not a misconduct then to answer the reference

accordingly as the question of holding a second enquiry then would not arise. To answer the contention as raised by the Petitioner it will have to be answered whether the order of the Tribunal in holding that the charge as framed does not amount to a misconduct, suffers from an error of law apparent on the face of the record. In the instant case, the misconduct alleged was based on the material that the Respondent had availed of a loan but had not used the loan for the purpose for which it was sanctioned. Material had come on record to show that the vehicle was purchased by availing of a finance scheme of another company. That the money was recovered with penal interest by itself can not result in holding that there was no misconduct, if otherwise it fell within the definition of misconduct as alleged.

9. After hearing the parties, in my opinion no purpose will be served by by remanding the matter to the tribunal if the finding of the Tribunal that the charge does not amount to a misconduct is to be set aside. Misconduct alleged is of the year 1995. We are in the year 2004. The ends of justice therefore, demands that the proceeding be concluded and that parties should not be left again to orders that may be passed by the Tribunal and consequent challenges to the same. An issue then may also arise if the second enquiry could not be held, then

whether the Petitioners could justify their action based on the first enquiry as the Disciplinary authority really speaking had not rejected the findings of the enquiry officer on merits but considering the contention of the workman that the disciplinary authority could not depart from the findings of the enquiry Officer directed holding of the second enquiry. What is to be borne in mind is that the Enquiry Officer in the first enquiry held the workman not guilty. The Disciplinary authority found that the findings of the enquiry Officer are perverse and he chose to disagree with the same. On behalf of the workman a contention was raised that the Disciplinary Authority could not differ with the finding of the Enquiry Officer. That objection had no merits as it is within the jurisdiction of disciplinary authority. The Counsel for the Petitioner has pointed out that considering the language of Standing Order 2(j) the Deputy General Manager incharge of the Industrial establishment is also a competent authority. The General Manager while directing holding of the fresh enquiry had observed that the Respondent workman had raised an objection about the authority of disciplinary authority, reviewing the enquiry officer's report and further noted that though the Disciplinary authority within his right to review the findings of the enquiry Officer, in order to maintain fair play, ordered fresh enquiry. The

General Manager therefore had proceeded on the footing that the Deputy General Manager was the disciplinary authority. At any rate, in my opinion, for the view to be taken, this need not be gone into.

. In the instant case, we have had two enquiries. In the first enquiry conducted the workman was found not guilty by the enquiry officer. The Disciplinary authority found him guilty but no punishment could be imposed in view of the decision of the General Manager to hold fresh enquiry. In the second enquiry which proceeded exparte the enquiry officer found the workman guilty and the Disciplinary authority concurred with the findings of the enquiry Officer. The tribunal however, proceeded on the footing that taking loan and holding on the money and even not purchasing a vehicle would not amount to misconduct.

9. It is on this basis that the charge may now be considered. Admittedly the workman had taken advance on 22.4.1994. Till November, 1994 he did not purchased the vehicle, inspite of the communication and various letters addressed by the Management to the workman. The only communication to the Management is of 16.11.1994. After the show cause notice was issued on 25.10.1994 he was asked as to why he should not be charged for misconduct.

It is only after that did the workman place an order for purchase of a vehicle. The vehicle purchased was not initially hypothecated to the Petitioners but in favour of another financer. The hypothecation in the registration certificate was in the name of M/s. Ajmani Enterprises Motor Finance. It cannot be said considering the delay between sanction of the loan, the orders for purchase of the vehicle and the fact that workman was compelled to take loan from Finance Corporation for finance of the vehicle that the elements of the fraudulent misconduct were not established. In my opinion therefore, the findings of the Disciplinary authority in the first Enquiry or for that matter of the Second Enquiry cannot be faulted with. The charge against the workman amounted to a misconduct and was proved. The mere fact that the loan was recovered with penal interest or that the workman was not entitled to a loan for another period of five years has no bearing on the act of misconduct. The misconduct is taking a loan and not using it for the purpose of which it was advanced. The money advanced as a benefit at a concessional rate of interest had to be used for the purpose for which it was advanced within a reasonable time. Failure to do so would amount to misconduct. The finding and consequently the orders of the Tribunal to that extent must be set aside.

10. Once having said so, the question is what the quantum of punishment to be imposed. It is true that ordinarily a writ court does not enter into the area of punishment imposed unless for good reasons. In the instant case, the loan advanced to workman was carrying interest of 2.5%. On account of default and even before the show cause notice, the petitioners were recovering interest from the workman at the rate as high as 25.75% as on 29.6.1994. The entire amount has been recovered from the salary of the workman. By the second enquiry the punishment sought to be imposed was demotion to the Lower grade and consequent reduction of basic salary from Rs.2997/- to Rs.2961/-. To my mind considering what is set out the reduction to the lower grade would be harsh and disproportionate to the misconduct alleged and proved on the facts and circumstances herein. At the highest, considering the nature of the offence of which this court has held the respondent to be guilty, the ends of justice will be met if punishment is imposed by denying one increment in the time scale for a period of one year.

. Rule made absolute accordingly. No order as to costs.

(F.I. REBELLO,J.)